

Mr. Chairman, Your Excellency the Vice President of the Republic of Kenya, My Lords Judges of the Court of Appeal and the High Court, fellow Advocates of the High Court, Ladies and Gentlemen.

Standing before this gathering of my learned friends and other distinguished guests, I stand humbled and Honored probably in equal measure by the gesture of the Council of the Law Society of Kenya to bestow on me this honor and induct me into the Roll of Honor for lifetime service to the legal profession. They say a man's value is best measured by the views of his peers.

Mr. Chairman, I think it will be unprofessional and dishonorable for me to crack jokes tonight or talk lofty issues that are remote to the country and the legal profession. I think I am duty bound to talk about the bread and butter for the legal profession. The bread and butter issues of the profession take me and you to the factory that makes these commodities...the judiciary.

This evening, Mr. Chairman, I want to share with this distinguished gathering my few reflections on a subject that shapes our practice of law in a most fundamental manner. And that is the place of the judiciary in dispensing justice in a third world country like Kenya. In the same breath I like to show this distinguished gathering how this problem has greatly

been created by a docile and at times boot leaking Bar that has failed to play its statutory role in helping the Kenya judiciary reform itself and improve on service delivery.

My Chairman, I proudly and unapologetically stand as a voice that stood up to the many glaring failures and indiscretions of the judiciary in Kenya right from the dark days of Kanu. I am proud to be a critic of this institution and I think I will continue to be so. I do so out of my personal conviction and as a call to duty. In my criticism of the judiciary, I have never been personal and have never taken a trajectory that deliberately vilified members of the judiciary for pure personal gain. My views have always been shaped by the need to improve the legitimacy of the judiciary and help this institution improve its service to both the legal professions and the people of Kenya.

Mr. Chairman the Kenyan judiciary has enormous potential for renewal and rebirth but also faces mortal danger. As I speak before you, you must have read in the local newspapers the endless industrial actions by lawyers in far flanked parts of the republic. Lawyers in Kitale, Eldoret, Busia and Bungoma and Meru among other stations are all up in arms against the quality, competence and integrity of judges that preside over our courts. It is only in Nairobi, Mombassa and nakuru that advocates seem to give members of the judiciary the benefit of doubt.

The complaints by lawyers range from the usual incompetence of judges to a very unusual new complaint which is a case of a judge fondling the breast and buttocks of anyone who comes within a certain radius of his judicial indiscretions. When I heard of this serial buttocks fondler, I was tempted to send him a copy of Robert Gillman's Book entitled, *A Short History of the Buttocks*. Unfortunately I couldn't send the book as no one in the judges' locality was mad enough to bell this randy judge.

The judiciary in light of the reforms encapsulated in the draft has an opportunity to renew itself. The draft prepared largely by our members has largely done a great job. It will lead to a rebirth of the judiciary. It will also insulate the judiciary from the previously promiscuous relationship it had with a plethora of entities. It creates a new judicial service commission that will have a wide range of function. Its budget will be independent of the executive and made directly by parliament and drawn from the consolidated funds. With such independence and financial autonomy comes responsibility. The judiciary with a first class budget must deliver to Kenya a first class justice. With enhanced remuneration and packages, the judiciary is expected to be corruption free. It is the hope of many, including myself that it will not be a case of the old wine in a new bottle. With the transition provisions in the constitution, the judiciary will be vetted in a systematic manner that is

solely intended to address the drawbacks that bedeviled the judiciary once and for all.

Mr. Chairman as I said I have been unrelenting in my critique of the judiciary. It actually started from the first day I appeared before the court of appeal. It was in Mombasa. After I argued a 5 (2) (b) application [what else does the court of appeal listen other than cases on its procedure] I formed the opinion that surely this was not the way to run the highest office in the land. In the subsequent 17 years of practice, that view has only hardened solidified and vindicated.

Criticism of an institution like the judiciary is both natural and necessary. In fact within the Kenyan context it is obligatory. An institution that cannot tolerate criticism is inherently unhealthy.

The absence of bold criticism of the Kenyan judiciary leads inevitably to distorted self perceptions. An institution that cannot hear criticism will lose opportunities to correct errors and improve and will never achieve its full potential.

We know from history that the Kenyan judiciary is hypersensitive to criticism. That is dangerously counterproductive. As everybody knows, thin skin is a characteristic of the insecure, and the Kenyan judiciary is

very insecure indeed. We practice law in a culture where even objective criticism of the judiciary is tantamount to professional suicide. I think I am a living testimony to the exception of this general rule. When your criticism is enduring the judiciary in Kenya seems to find away of co-existing.

Mr. Chairman, the criticism I have directed against the Kenyan judiciary with due respect has been a faire one. The judiciary as an institution has always asked Kenyans to offer criticism, but as W. Somerset Maugham, in his book, OF HUMAN BONDAGE (1915) at page 241 states:

“People ask you for criticism, but they only want praise”

They are those who praise the judiciary or makes excuses for it, but I am not! Criticism is essential even though it is painful. People and their institutions are fallible, missteps are inevitable, and successful people and institutions have always benefited from criticism. No one learns to ride a bicycle without falling. The learner who tumbles from a bicycle need not be told that something went wrong, gravity delivered the message.

Winston Churchill before he became prime minister was a constant thorn in the flesh of his party. He defended his action as both healthy and natural. In a speech he gave in the House of Commons, He said:-

“Criticism might not be agreeable, but it is necessary; it fulfills the same function as pain in the human body, it calls attention to the development of unhealthy state of things”.

I think, that is what I have tried to do with the Kenyan judiciary. I have as early as the mid 1990s called to attention the various unhealthy tremors that have grown on different parts of the judiciary.

Some members of the judiciary in their usual knee-jerked reactions irrationally react to some of my views about this institution. They usually take upon my clients issues they usually ought to raise publicly. During my time as an advocate, I have seen instances where both the court of appeal and the High Court have either overturn established and enduring principles just because I unfortunately for them, I happen to be on the right side of the law and even in one instance where an express provision of the law was subverted.

For instance in Air Alfaraj limited versus Raytheon Aircraft Credit Corporation and Another [2000] KLR 624. This case arose as a result of a preliminary objection that was raised and dismissed in the superior court. The court of appeal has held for decades that one must obtain leave of the

court before an appeal is lodged. I simply cited those authorizes. At page 629 line 33 the court held:

“Mr. Ahmednasir must know that despite his deep contempt for the majority of the judges of this court he will always be accorded a fair hearing in this court because our duty is to do justice to the parties that come before us”.

They dismissed my case and in the process overruled a litany of cases that established the principles I argued before the court. That was the wrapped justice they had in mind.

Recently I argued before a judge to dismiss an election petition because our client's instruction was that the petitioner who was a Kenyan acquired the nationality of another country. I premised the application on section 97(3) which reads:

“A citizen of Kenya shall subject to subsection 7 cease to such a citizen if having attained the age of twenty one, he acquires the citizenship of some other country than Kenya by voluntary act(other than marriage).

The judge dismissed by application and held that dual nationality is allowed by the constitution. So, if that is truly the case, why are inserting that as a new right in the constitution?

Some people are more venerable to a lack of criticism than others, and among the most venerable are judges. After all, besides their staff, judges interact most with lawyers appearing before them who constantly throw themselves at their feet asking for a prayer here, another there. Saying lawyers treat judges with deference fails to capture the relationship accurately; it is more accurate to say that lawyers bow and scrape. Some lawyers have elevated fawning to an art form, pulling it with subtle elegance. Others are grotesquely obsequious. But few have the temerity to tell a judge she is wrong.

The result of such treatment on good men and women who become judges is predictable. The dedication and humility of the new judges is quickly strained. The humility is quickly dissolved by unrelenting sycophancy. Treat someone as omniscient long enough and he may come to believe it himself. People who think themselves in such mould become over bearing, scornful and cantankerous.

The issue of bad judges is not something that bedevils only Kenya. Fine, we may have more than our fair share, but even advanced democracies

like America grapple with this problem. In 1983 the American bar association published an article called good trial judges in vol 9 number 3 of the litigation journal. The article goes on to list what it considers the attributes of a bad judge these include:

- **Bias.** This is the biggest red flag of a bad judge. A biased judge is one that doesn't seek to achieve the right result but rather seeks to serve his her own personal likes and dislikes and have nothing to do with the legal issues before the judge.
- **Laziness.** Yes, there are lazy judges—very lazy judges. They don't read and don't want to do any real work. Avoiding trial is the biggest way of avoiding work. When one finds a trial judge always trying to muscle their way out of a trial, that may be a lazy judge.
- **Incompetence.** The sign of an incompetent judge is a judge that avoids reasoned decisions. Nothing exposes an incompetent judge more than the judge "working in secret and mysterious ways". What is an incompetent judge supposed to do, give reasoned decisions that expose his incompetence to the public?

A more elaborate analysis of bad judges is written by Professor Geoffrey P Miller of New York university published Texas law review. It is 56 pages and 397 footnotes.

Corrupt judges are also not limited to Kenyan judiciary. They are everywhere, including in America. Probably what we have different in Kenya is because corruption is rampant that one could be forgiven to think that judges just the advocates have their own remuneration order in deciding what is due to them.

Mr. Chairman, it is my believe that they are many good judges in Kenya. They are many, very many, but the poor and bad judges out number them. I have argued cases before judges that restored by faith both in the justice system and in the judiciary. And I case I will never forget was before justice Githinji. It was a review of a judgment. He strike the defence of a client and entered judgment for a bout 100 million. I took the case from a senior lawyer and filed a review application. The lawyer on the other side has huge experience and reputation in the profession and I thought, the case of persuading the judge to overturn his judgment was minimal. I thought what the heck! After many months of argument, the judge delivered a breath taking judgment in which he set a side his previous decision and set wide ranging principles of law in the area. I breathed a sigh of relief, being cynical, I laughed to myself and said, surely they are men and women of integrity and faith, after all.

Githenji delivered a double. In the midst of arguing the case, I was refused to be heard by a judge in milimani commercial court, when I said

certain judges are so shallow that they have given the word shallow a new depth. I appeared before justice Githnji and I thought he will say similar words. He told me and the law in confidence, something I now elect to say loudly. He said “Ahmed what you said is true...of course I cant shout loud but I hold similar view”. I of course apologize to justice githinji for breaching the promise I made to him.

Mr Chairman once upon a time when Justices Ringer, Onyango Oteino, Mwera, Ransley and the late Hewitt were judges in the commercial court. Justice used to be dispensed without fear and favor. In fact that was a golden era of the judiciary. We want that kind of justice at every level of the judiciary.

APART from my attempt to drawn people’s attention to corruption and incompetence of the judiciary, an equal big grievance I personally have against the judiciary is its inability or even the refusal of the judiciary to play its rightful role in shaping the destiny of the country. Of course one can legitimately ask, But if it suffers the twin vices of corruption and incompetence how can one expect it to lead the country? Let me give you a recent example of this. A month ago after Justice Ibrahim declared the election of Chirua Ali Makwere as null and void; the former minister filed an application in the court of appeal. The court spent considerable time hearing the application, and declined to give interim orders. It

reserved its rulings. Five days before the scheduled ruling, the speaker issued writs that the matunga seat is vacant. On the court of appeal on the day scheduled come with the excuse, that the rulings has been overtaken by events since the speaker during the intervening period has issued writs. Isn't that a real indictment of the court? How self depreciating can the court of appeal be? The courts should probably read on the judgments by American courts on the doctrine of mootness.

I am sure you are all aware of the indispensable role the judiciary plays in both advanced democracies and even some developing countries. Countries like the United States of America, Britain, Canada, Australia, Germany and India have made great strides in societal development principally because of the judiciary. We all know the breath taking revolution brought about in America by the Warren court. This Supreme Court presided over by chief justice Earl Warren is recognized as the high point in the use of judicial power in the effort to effect social progress in America. In the process, justice warren became widely regarded as the most influential Supreme Court justice in the history of the United States. He freed the blacks literally extended voting rights and turned the criminal justice upside down.

Mr. Chairman, when Earl Warren was appointed by President Eisenhower as the 14th chief justice of America he thought he will lean

to the right as a conservative judge. He said "He represent the kind of political, economic and social thinking I believe we need in the court".

After he left a trail of liberal judgment, Eisenhower was asked about his decision to appoint warren, And he said "The biggest damned fool mistake I ever made".

Mr. Chairman, we needs judges that attract passion and loath in equal measure. If we check the chief justice I practiced law since 1993 starting with Hancock, Apollo, cocker, chesoni, chungu and chief justice gicheru, I can tell that they will be lucky to be remembered even as footnote when the history of Kenya is written a century or two in the future. Chungu will be remembers for his famous rant of "experts on what, for what about what..." Cockar has now made a name as chairman of commissions and tribunals. He left no legacy. Chesoni as ECK chair. Gicheru for the radical surgery which has half measure in my view. Blood was spilt on the floor, none on the ceiling!!

Mr. Chairman in my view and belief that one should not become a judge, because of salary, or need to pay the fees for ones children or want to start business. It must be to leave a legacy, so that students of legal history will forever debate on the dialectical sides of the discourse how a good or bad judge one was.

Legitimacy or faith in judiciary cannot be imposed. It is earned. The Kenyan judiciary has failed to earn the respect of Kenyans. It is not by threatening lawyers with contempt or dismissing their case that the judiciary will be respected, NO. Our courts will be respected and adored when they do justice, shove the executive and legislature to the sides and become the center of both attention and attraction.

Throughout the world, it is the judiciary through bold and revolutionary judgment that shapes the politics, people and business of the country. It is not necessarily the executive or the legislature that has shaped the destiny of countries. True they may play pivotal roles, but surely, countries are usually transformed by their judiciary.

The US Supreme court in the case of Planned Parenthood versus Casey, 505 U.S 833, 865-66(1992) stated:

“As Americans of each succeeding generations are rightly told, the court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience of its decrees. The court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the public acceptance of the judiciary as fit to determine what the nation’s law means and to declare what it demands...Thus, the court’s legitimacy depends on making legally principled decisions under

circumstances in which their principled character is sufficiently plausible to be accepted by the nation”.

This can be contrasted in a judiciary which displays shocking display of judicial indiscretion. In Kenya our country instead of earning the respect and administration of the citizenry have played games with the rights of Kenyans. The courts first demonstrate what results it wants to reach and then squeezes its rationale to fit the result. The judgment then twists the facts and the law inappropriately to fit the results that the court desires.

In many jurisdictions the jurisprudence of the courts is turf war on whether the courts are engaging in judicial activism or judicial restraint. It is based on well entrenched positions based on beliefs and principles. This on the side extreme sides of the spectrum. In Kenya judges have no clue on either activism or restraint.

CONCLUSION.

Mr. Chairman, it is my belief that we have an obligation as lawyers to be truthful to power and tell the truth as it is, no matter what the consequence. We must help reform the judiciary, so that the country can move faster and in the right direction. The judiciary is too important an

institution to left wallowing in the morass of corruption, incompetence and inefficiency it is at present bogged in.

For the judiciary to improve, lawyers must become critics....thoughtful, respectful critics to be sure, but critics nonetheless. Lawyers are not merely legal technicians. They are leaders. In America half its senators are lawyers and two thirds of all its presidents and vice presidents and members of the cabinet were lawyers. Even Saddam Hussein was a lawyer. Even the current president of the TFG in Somalia has a legal training, only that his country hasn't seen peace for him to practice law. I call upon lawyers to rise to the occasion and reform the judiciary, first and then the rest of the country.